

**BEFORE
SEAN J. ROGERS
ARBITRATOR**

In the Matter of Arbitration between:

**AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
Council of Prison Locals #33, Local 922
Union**

and

**UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTIONAL INSTITUTION,
FORREST CITY, ARKANSAS
Employer.**

Grievant: *Kenneth Brown*

FMCS Case No.: 03-13053

DISCOVERY ORDER

INTRODUCTION

In aid of the presentation of its arbitration case, the American Federation of Government Employees, Council of Prison Locals #33, Local 922 (Union) has requested from United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas (Employer) a break down of the disciplinary charges and resulting disciplinary actions for all staff at the Federal Correctional Institution, Forrest City, Arkansas (FCI) from the opening of FCI in 1998 to date. The Union has requested that the breakdown identify the staff by management and bargaining unit status and list, if known, the affected employees' race and gender. The Union asserts that the Employer has had this Discovery Request since the Union invoked arbitration, but the Employer has not responded. The Union's Discovery Request was discussed among the parties and the Arbitrator at a hearing held on March 4, 2004 at Forrest City, AR. At that time, the Arbitrator asked the parties to attempt to resolve the issues raised by the Union's Discovery Request.

On September 1, 2004, a conference call was held among the parties and the Arbitrator to address certain pre-hearing matters in preparation for an additional two days of hearing on September 13 and 14, 2004 at Forrest City, AR.

In a subsequent exchange of e-mails among the parties and the Arbitrator, the Union renewed its Discovery Request which the Employer had not fulfilled. The parties have not resolved the issues raised by the Union's Discovery Request. The Employer's representative asserted that she was not able to find the original Discovery Request or the FCI Human Resources' representative's response. The Employer stated that it intended to call Warden Jeter, the deciding official in the instant disciplinary action which is the subject of this arbitration. According to the Employer, Warden Jeter was the FCI Warden from August 11, 2002 through August 21, 2204 and therefore, the Employer says that it will prepare a "redacted copy of the [disciplinary] Log for that timeframe. The log should include date of charge, charge, proposed penalty, and decision." The Employer argues that information beyond this time period will require the Union provide a particularized need for the information pursuant to the requirements of case law and 5 USC § 7114(b)(4). The Employer argued that a Union claim of disparate treatment must involve substantially similar offenses, the same work unit, supervisor and geographical area. The Employer argued that decisions made prior to Warden Jeter's tenure "would not be considered for a disparate treatment charge."

The Employer's response is a partial denial of the Union's Discovery Request and does not state when the information requested will be provided to the Union. For these reasons and for the reasons discussed below, I am issuing this Discovery Order.

THE UNION'S DISCOVERY REQUEST

The discussions among the parties and the Arbitrator on March 4, 2004, established that the Union has had a Discovery Request pending with the Employer for some time. Moreover, the Employer's representative does not deny that the Employer received the Union's Discovery Request but she states:

I am unable to find an original request from you for this information, nor can I find a response from the HR. (Employer's e-mail response September 1, 2004).

In addition, the parties and the Arbitrator discussed the Union's Discovery Request at length at the March 4, 2004 hearing. Therefore, the Employer was once again on notice at that time of the Union's continuing interest in the information requested in order to present its case. The Union renewed its request in the e-mail exchanges among the parties and the Arbitrator on September 1, 2004.

For all these reasons, I find that there is no reasonable grounds for the Employer to delay in responding to the Union's Discovery Request. The Union is entitled the information in a timely manner and it is entitled to have time review the information before the next hearing date.

THE APPROPRIATE TIME PERIOD

In her September 1, 2004 e-mail, the Employer's representative's has committed to providing a breakdown or log on the disciplinary charges and actions taken by Warden Jeter from August 11, 2002 through August 21, 2004. The Union's Discovery Request extends beyond Warden Jeter's tenure to the start up of FCI in 1998. Based on the Union's claims at arbitration, its Discovery Request is reasonable. In addition, the Employer's objections to providing the requested information beyond Warden's Jeter's tenure are argumentative and do not state a reasonable grounds for denying the Union's Discovery Request. Therefore, the Employer's proposed response to the Union's Discovery Request is too limited.

I find that the Employer must provide the Union with the breakdown or log of disciplinary charges and actions taken against all FCI staff from the opening of FCI in 1998 to date. The information must identify the staff by management and bargaining unit status and list, if known, the affected employees' race and gender.

PARTICULARIZED NEED

The Union asserted in its original grievance and subsequently that it believed the Grievant is the victim of disparate treatment with regard to appropriate penalty. The Union also asserts claims on the Grievant's behalf related to "whistleblower" status and reprisal for being a "whistleblower." The Union called and examined witnesses at the March 4, 2004 hearing in support of its claims. Under these circumstances, the Union's particularized need is based on the assertion of its rights to grieve and arbitrate disputes over disciplinary actions under the parties' collective bargaining agreement and 5 USC § 7101, *et seq.* The Union's particularized need for the information requested is self evident and associated with the Union's duties, responsibilities and obligations as the exclusive representative of employees in the bargaining unit generally and this Grievant specifically.

I find that the Union has stated a sufficient particularized need such that the Employer must provide the requested information.

ORDER

For the reasons discussed above, the Employer must provide the Union with the following information by close of business September 9, 2004:

A document which displays a breakdown or log of the disciplinary charges and resulting disciplinary actions for all staff at the Federal Correctional Institution, Forrest City, Arkansas from the opening of the Institution in 1998 to date; identifying the staff by management and bargaining unit status; listing, if known, the affected employees' race and gender; and including the name or position title of the deciding official.

This Discovery Order does not limit the right the parties to object to the relevance or materiality or argue the probative value of the information contained in the document based on appropriate law, rule, regulation or case precedent or to argue any other grounds concerning the lack of probative value of the information.



Sean J. Rogers
Alexandria, Virginia
September 2, 2004

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